



JEROME ALDRICH
CRIMINAL DISTRICT ATTORNEY
BRAZORIA COUNTY
111 EAST LOCUST, RM 408A
ANGLETON, TX 77515

November 20, 1997

Honorable Dan Morales
Attorney General
Attn: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

RECEIVED

NOV 24 1997

20-1038
FILE # ML-39934-97
I.D. # 39934

Opinion Committee

Dear Mr. Morales:

Richard and Wanda Blake own tracts 63 and 64, Division 7 of the Brazos Coast Investment Company Subdivision, F. J. Calvit League, Abstract 51, Brazoria County, Texas. Less and except 0.77 acre out of Tract 64. (See attached exhibit A.) This land is partially submerged by tidal water. However, these two tracts were not always submerged. In 1963 or 1964 dirt was removed from these two tracts to create a levee. (See exhibit B.) It was this act that caused the two tracts to become partially submerged with tidal water.

The Blake's submerged property attracts a lot of fisherman. The Blake's understand that fishermen can take a boat on the tidal water to fish. Their concern is when fishermen get out of their boats and step on the property beneath the tidal waters that the fishermen are trespassing on their property. Their concern is also as to any harm to fishermen they may be liable for that occurs while fishermen are on their property. (See exhibit C) It is my belief the fishermen when they get out of their boats and step on the submerged property are trespassing.

On behalf of the Blake's, I hereby submit the following question, together with the accompanying brief and other documents:

1. Are the fishermen trespassing upon the Blake's property when they step on the private property that lies beneath the tidal water?

Sincerely,

A handwritten signature of Jerome Aldrich in black ink, written over a printed name.
JEROME ALDRICH

BRIEF IN SUPPORT

The State of Texas is the owner of the ordinary flow, underflow, and tides of every flowing river, stream, lake, bay, and the arm of the Gulf of Mexico. Vernon's Texas Code Annotated Water Code §11.021. Water covering privately owned submerged land is also state water. Op. Atty Gen 1973, No. H-68. Since this water is State owned the public has a right to use the water for lawful purposes, such as fishing. Id. However, the right to use water for enjoyment does not give the public the right to trespass on the property itself to gain access to the water. Id. . -

In *Port Acres Sportsman Club v. Mann*, the court held that the plaintiff was the owner of the bed which was under a navigable stream. 541 S.W.2d 847, (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). When the plaintiff purchased the land the water covering the land was not navigable. Id. The Court held that since the waters over the plaintiff's land were not navigable at the time the land was acquired, the subsequent event of the waters becoming navigable could not deprive plaintiffs of their title to the underlying land. Id. Even though the plaintiff owns the land he was not able to erect barriers to keep people from using the water. Id.

Mann is analogous to the present case. The property, tract 63 & 64, now owned by the Blake's, was not always covered with water. The submergence of the land with tidal water was created by man when dirt was removed from these two tracts to create a levee. The creation of the levee created the submergence of the land.

Section 30.05 of the Penal Code defining criminal trespass as:

- a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
 - 1) had notice that the entry was forbidden; or
 - 2) received notice to depart but failed to do so.
- b) For purpose of this Section:
 - 1) "Entry" means the intrusion of the whole body.

In a recent Attorney General Opinion, it was considered whether it would be trespassing for a hunter to anchor his boat over private submerged property. Letter

Opinion No. 97-079 (August 27, 1997). It was determined that this act of anchoring the boat was not enough to meet the "entry" requirements of trespassing. *Id.*

Unlike that opinion, the present situation does have fisherman entering the property with their bodies, not just with an instrument. These fisherman also have notice that entry is forbidden by posted signs.

In the present situation, the Blake's are not preventing fisherman from using the tidal water to fish as long as they are in boats. However, once they step out of the boat into the water and stand on the submerged land, it is our contention they are trespassing on the property of the Blake's.

EXHIBIT A